



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Black Warrior Constructors

File: B-230098

Date: February 23, 1988

DIGEST

1. Protester's allegation that first and second low bidders are foreign firms from a country which may in the future pursuant to Pub. L. No. 100-202, 101 Stat. 1329 (1987), be placed on the United States Trade Representative's list of countries that discriminate against United States firms and therefore, should be ineligible for award is without merit because the law only prohibits award to foreign firms whose country is on the list.
2. Protest alleging solicitation impropriety which was apparent prior to bid opening is untimely when filed after bid opening.
3. Submission and possible acceptance of an alleged below-cost bid is not legally objectionable.

DECISION

Black Warrior Constructors, a joint venture, protests the award to any other bidder under invitation for bids (IFB) No. DACW01-87-B-0109 issued by the United States Army Corps of Engineers for the modification of Oliver Lock on the Black Warrior-Tombigbee Waterway in Alabama.

We deny the protest.

Bids were opened on January 13, 1988. The protester was the third lowest bidder. Fru-Con Construction Company was the lowest bidder and J.A. Jones Construction Company the second lowest bidder. The protester contends that Fru-Con and J.A. Jones are not qualified to receive award of the contract because of Section 109 of Public Law 100-202, 101 Stat. 1329 (1987). Section 109, in essence, prohibits the award of contracts for construction of public works to firms from certain foreign countries designated by the United States Trade Representative as discriminating against United States

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firms in conducting procurements for their public works projects. The designated countries are to be placed on a list published in the Federal Register. The protester alleges that Fru-Con and J.A. Jones are West German firms and while acknowledging that Japan is the only country currently on the Trade Representative's list, argues that both firms are ineligible for award because there is no indication that the Trade Representative has investigated West German trade practices. The protester argues that no award to a foreign firm should take place until the Trade Representative "makes a determination" with regard to West Germany.

The Trade Representative is required by Section 109(b) to make his determinations within 30 days after enactment of Public Law 100-202, which occurred on December 22, 1987. On January 25, 1988, the Trade Representative determined that insufficient information was available for him to make a formal determination with respect to any country other than Japan and that the list would be expanded at a later date if sufficient information indicated that another country was denying the United States firms fair market opportunities. 53 Fed. Reg. 2140 (1988).

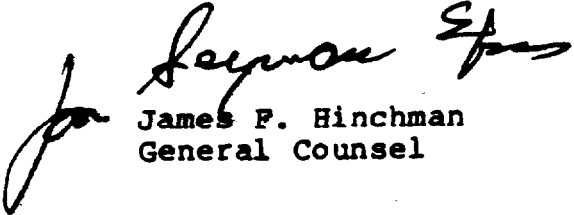
Section 109(a) prohibits obligating or expending funds to enter into a contract with a foreign company "during any period" in which such foreign country is listed by the Trade Representative. West Germany is not currently on the list; accordingly, Public Law 100-202 does not preclude the award of a contract to a West German firm. The protester's contention that the Corps must wait until there is some indication from the Trade Representative that he has affirmatively made a decision with respect to West Germany is not supported by the language of Public Law 100-202.

The protester also argues that the IFB did not request information or certification of compliance with Public Law 100-202 which the protester believes should be a pre-requisite to contract award. Public Law 100-202 does not require agencies to include a certification in the solicitation. In any event, this ground of protest is based on an alleged impropriety in an IFB that was apparent from the face of the solicitation and is therefore untimely because it was filed after bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1987).

Black Warrior alleges that the bids of Fru-Con and J.A. Jones are too low because they did not make proper allowance for profit. Even if this were true, there is no legal basis on which to object to the submission or acceptance of a below-cost bid. Applied Controls Co., Inc.--Request for Reconsideration, B-228568.2, Nov. 30, 1987, 87-2 CPD ¶ 528.

Finally, the protester requests that we suspend action on this protest until the Trade Representative rules on the status of West Germany. We cannot honor this request. Our function is to rule on the protest based on the record before us. It is clear from the record and from the plain language of the law that this protest has no merit. There is simply no basis for us to delay this decision because the protester speculates that the facts may change at some time in the future.

The protest is denied.


James F. Hinchman
General Counsel